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SUPREME COURT, U.S.

NO. 80-6692

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

WILLIAM DURWOOD BUSBEE,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

ON APPEAL FROM
THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

JURISDICTIONAL STATEMENT

HARRIS E. KERR
P. O. Drawer 511
Midland, Texas 79702
(Area Code 915) 683-5291

ATTORNEY FOR APPELLANT,
WILLIAM DURWOOD BUSBEE

QUESTIONS PRESENTED

1.

Whether statutory denial of the right to appeal the revocation of his deferred adjudication probation, while those on regular probation (whose significant liberty interests are, if anything, less significant) are statutorily guaranteed the right to appeal revocation of their probation, denied Appellant the equal protection of law mandated by the Fifth and Fourteenth Amendments to the United States Constitution.

2.

Whether the State of Texas, in seeking to revoke Appellant's deferred adjudication probation, may constitutionally deny Appellant a significant portion of the procedural due process rights the State statutorily guarantees to other types of probationers, when at worst all types of Texas probationers are similarly situated with similar concerns and interests, and more probably when Appellant (and other deferred adjudication probationers) has a significantly greater liberty interest than non-deferred adjudication probationers.

3.

Whether the State of Texas, having statutorily extended to Appellant the chance that no record of criminal conviction would appear on his record if he satisfactorily completed his deferred adjudication probation, denies Appellant due process of law and equal protection of law when by statute it denies him the protection against abuse of discretion, the right to appeal revocation of that probation, which the State by statute expressly grants to other types of probationers, similarly situated.

PARTIES TO THIS PROCEEDING

All parties to this proceeding are named in the caption of this case, being William Durwood Busbee and the State of Texas.

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Constitutional Provisions:

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28 U.S.C., Section 1257(2) ---------- 1

Article 42.12, Texas Code of Criminal Procedure ---------- 2, et seq.

Article 44.02, Texas Code of Criminal Procedure ---------- 3, 5, 7

OPINION OF THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

The Court of Criminal Appeals dismissed Appellant's appeal by per curiam (unpublished) opinion, noted at 611 S.W.2d 851 (1981). A copy of the unpublished opinion of the Court of Criminal Appeals, delivered January 7, 1981, is contained in the Appendix to this Jurisdictional Statement.

GROUNDS ON WHICH JURISDICTION IS INVOKED

This proceeding is an appeal from the decision of the Court of Criminal Appeals of the State of Texas, delivered January 7, 1981. A motion for rehearing was timely filed with that Court, and leave to file the same was denied by that Court on February 18, 1981. Notice of Appeal to this Court was filed with the Texas Court of Criminal Appeals on May 12, 1981.

Appellant believes that Section 1257(2) of Title 28, United States Code, confers on this Court jurisdiction to the judgment of the Texas Court of Criminal Appeals.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourteenth Amendment to the Constitution of the United States provides, among other things, that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws."

2. Sections 1 through 8 of Article 42.12 of the Texas Code of Criminal Procedure, the Adult Probation Parole, and Mandatory Supervision Law, are set forth in full in the Appendix to this Jurisdictional Statement. In pertinent part, however, Section 3(d) of Article 42.12 is as follows:

> "Sec. 3d. (a) When in its opinion the best interest of society and the defendant will be served, the court may, after receiving a plea of guilty or nolo contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt, and place the defendant on probation on reasonable terms and conditions as the court may require and for a period as the court may prescribe not to exceed 10 years...
>
> (b) On violation of a condition of probation imposed under Subsection (a) of this section, the defendant may be arrested and detained as provided in Section 8 of this Article. The defendant is entitled to a hearing limited to the determination by the court of whether it proceeds with an adjudication of guilt on the original charge. No appeal may be taken from this determination...(emphasis supplied)."

In pertinent part, Section 8 of Article 42.12, pertaining to probation granted other than pursuant to Section 3(d) of Article 42.12, provides as follows:

> "(b)...The right of the probationer to appeal to the Court of Criminal Appeals for a review of the trial and conviction, as provided by law, shall be accorded the probationer at the time he is placed on probation. When he is notified that his probation is revoked for violation

> of the conditions of probation and he is called upon to serve a sentence in a jail or in an institution operated by the Department of Corrections, he may appeal the revocation (emphasis supplied)."

3. Article 44.02 of the Texas Code of Criminal Procedure provides as follows:

> "A defendant in any criminal action has the right of appeal under the rules hereinafter prescribed, provided, however, before the defendant who has been convicted upon either his plea of guilty or plea of nolo contendere before the court and the court, upon the election of the defendant, assesses punishment and the punishment does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney may appeal, he must have permission of the trial court, except on those matters which have been raised by written motion filed prior to trial. This Article in no way affects appeals pursuant to Article 44.17 of this chapter."

STATEMENT OF THE CASE

Appellant pled guilty to the felony offense of possession of more than four (4) ounces of marijuana at a hearing held before the trial court on May 25, 1978 (Tr. pp. 1, 8). Pursuant to Section 3(d) of Article 42.12, Texas Code of Criminal Procedure, the trial court entered its order deferring adjudication of guilt and further proceedings, and placed him on probation for a term of five (5) years. One of the conditions of that probation was that he commit no violation of law (Tr. p. 9).

On June 9, 1978, the State filed a motion to revoke Appellant's probation and proceed with adjudication of guilt. Appellant was arrested, and a hearing on the State's motions commenced August 10, 1978, before the Court (Tr. pp. 18, 19; S.F. p. 2).

The State's motion to revoke Appellant's deferred adjudication probation alleged that he had violated the terms of his probation by committing an offense, in violation of state law, by possessing marijuana. This was a hotly contested issue, as the marijuana had not been found on Appellant or in his presence, but instead had been found in a bedroom in a mobil home rented and occupied by several other persons, where Appellant occasionally stayed overnight (Tr. p. 19; S.F. 195, 166).

The trial court ordered that Appellant's deferred adjudication probation be revoked, and proceeded to adjudicate Appellant's guilt and sentence him to a term of six (6) years in the Texas Department of Corrections (Tr. pp. 36, 37). Appellant's motion for new trial was denied, although in support of the motion the Court had heard testimony, and received an affidavit, from one of the renters of the mobil home who admitted the marijuana in question was hers, and that she had placed it in the bedroom (Tr. p. 39; S.F. pp. 203, 225, 226, 243). The motion for new trial was denied (S.F. p. 242).

Appellant thereafter filed a pro se notice of appeal, and the attorney representing Appellant in the present appeal to this Court was appointed to "handle whatever appeal rights the defendant may have without permission

of the trial court", and was specifically denied the permission to appeal from the plea of guilty which Article 44.02 of the Texas Code of Criminal Procedure requires (Tr. pp. 43, 44, 52, 53, 54).

In his appeal to the Texas Court of Criminal Appeals, Appellant specifically claimed an error that to the extent that Section 3(d) of Article 42.12, Texas Code of Criminal Procedure, purported to deny Appellant the right of appeal, such as a denial of the due process of law guaranteed him and the statute was constitutionally invalid. Panel 1 of the Court of Criminal Appeals dismissed Appellant's appeal by per curiam order delivered January 7, 1981. In its per curiam opinion (set forth in full in the Appendix hereto), the Court said "All of Appellant's grounds of error relate to the Court's action in determining to adjudicate guilt and the statute makes clear there is no appeal from such determination" (citations omitted; Opinion of the Court of Criminal Appeals, page 2). Appellant believes this is an express ruling that the statute is valid, made as it was in the face of points of error that the statute was constitutionally impermissible.

Appellant filed a motion for rehearing en banc, specifically pointing out to the court that he claimed that Article 42.12, Section 3(d), and the procedures called for thereby, denied him equal protection of the laws and due process of law by allowing no appeal from the decision to revoke deferred adjudication probation and adjudicate his guilt, while those similarly situated on other forms of probation were given appellate rights. The Court of Criminal

Appeals denied leave to file the Appellant's motion for rehearing en banc on February 18, 1981. The Court of Criminal Appeals refused to stay the issuance of its mandate, and Appellant is now in the custody of the Texas Department of Corrections. This appeal resulted.

WHY THE QUESTIONS PRESENTED REQUIRE PLENARY CONSIDERATION

This case asks whether or not the State of Texas may deny one class of probationers any right to appeal the revocation of their probation while other classes of probations are expressly granted such an appeal as a matter of right, when all of those probationers are similarly situated, with virtually identical interests in their continued liberty on probation. In fact, Appellant believes he has even a greater liberty interest at stake, and is entitled at least to the protections afforded other probationers, if not greater protections.

Probation under Section 3(d) of Article 42.12 is granted after a plea of guilty or nolo contendere has been accepted by the trial court and is granted without the Court ever entering an express adjudication of the defendant's guilt on record. Probation under Sections 3 and 3(a) of Article 42.12, on the other hand, is granted after conviction or plea of guilty (Section 3), or on jury recommendation (Section 3(a)). Except with regard to probations granted by jury, when only certain statutory conditions of probation may be imposed, the court may impose such conditions of

probation as it deems proper as to deferred adjudication probation and other (non-jury) probation. But there the nature of the two types of probation diverge.

Section 8 of Article 42.12 grants a probationer under Section 3 or 3(a) numerous rights upon an allegation of violation of probation. He has the right to move for a hearing within twenty (20) days of his motion; if his probation is revoked, the court may maintain or reduce the original term of imprisonment but may not increase that term; and he is expressly granted the right to appeal revocation of his probation to the Court of Criminal Appeals.

The deferred adjudication probationer, on the other hand, is accorded none of these rights. Section 3(d) does not provide for a speedy hearing, on motion. It has been determined that the trial court does have the power to increase the sentence imposed from the original term of probation to a longer term, as happened in this very case. See McNew v. State, 608 S.W.2d 166 (Tex. Crim. App., 1978, rehearing denied, 1980), writ of certiorari applied for. And the right to appeal from the revocation of probation and proceeding to adjudicate guilt is expressly denied by Section 3(d). This leaves a deferred adjudication probationer whose probation has been revoked and guilt adjudicated only a largely meaningless appeal from his original plea of guilty or nolo contendere, and then only if the trial court grants permission to appeal pursuant to Article 44.02 of the Code of Criminal Procedure. As the Texas Court of Criminal Appeals so carefully pointed out in dismissing this case, Appellant could not appeal the revocation and adjudication,

and had no permission to otherwise appeal. Thus dismissal was the remedy.

Clearly the expectation Appellant had under Section 3(d) that he would be allowed his liberty on probation was a protected "liberty interest", under Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973). We submit that the right granted by Section 3(d), to be free from having an adjudication of guilt and conviction on one's record during the period of good behavior on probation, is an additional "liberty interest" accorded deferred adjudication probationers and not other probationers, under the Court's ruling in Vitek v. Jones, 445 U.S. 480 (1980), where the Court said "But if the State grants a prisoner a right or expectation that adverse action will not be taken against him except upon the occurrence of specified behavior, 'the determination of whether such behavior has occurred, and the minimum requirements of procedural due process appropriate for the circumstances must be observed'" at pages 490 and 491, citing Wolff v. McDonald, 418 U.S. 539 (1974). See also Micklaus v. Carlson, 632 F.2d 227 (3rd Cir. 1980), holding that expectations under the Federal Youth Corrections Act create such "liberty interests".

We believe that this means not only is a deferred adjudication probationer entitled to the same procedural due process accorded other probationers, he is entitled to appropriate procedural due process to protect the additional liberty interest or expectation of not being adjudicated guilty of an offense during good behavior. And we believe that Section 3(d) of Article 42.12 of the Texas Code of

Criminal Procedure denies that due process to Appellant and other deferred adjudication probationers.

Even more importantly, Section 3(d) expressly denies Appellant the equal protection of law guaranteed him by the Fourteenth Amendment to the United States Constitution. Section 8 of Article 42.12 expressly guarantees probationers (other than deferred adjudication probationers) the right to appeal the revocation of probation, while Section 3(d) expressly denies deferred adjudication probationers the right to appeal revocation of their probation and adjudication of their guilt. The protected liberty interests of Appellant, a deferred adjudication probationer, and other probationers, in remaining on probation, and not in confinement, are identical. There can be no compelling reason, nor, we submit, any rational basis whatsoever, in discriminating against the class of deferred adjudication probationers and denying them the appellate rights accorded other probationers. In fact, the additional protected liberty interest the statute creates in deferred adjudication probationers calls for more protection, not less. The State cannot rationally justify the distinction between the rights granted deferred adjudication probationers and other probationers.

CONCLUSION

By granting some probationers appellate rights while denying others, in exactly the same situation (if not deserving of even more protection), those appellate rights, the State of Texas has denied Appellant the equal protection

of law and due process of law guaranteed by the Fourteenth Amendment, Section 3(d) of Article 42.12, Texas Code of Criminal Procedure, is constitutionally invalid, and this Court should reverse the decision of the Court below and remand this case for proceedings under the original indictment, as if none of the intervening proceedings, including Appellant's plea of guilty, had taken place.

Respectfully submitted,

Harris E. Kerr

HARRIS E. KERR
P. O. Drawer 511
Midland, Texas 79702
(Area Code 915) 683-5291

ATTORNEY FOR APPELLANT,
WILLIAM DURWOOD BUSBEE

CERTIFICATE OF SERVICE

On this the 14 day of May, 1981, a true and correct copy of the foregoing Jurisdictional Statement was hand delivered to:

David Joers, Esquire
Vern Martin, Esquire
Office of the District Attorney
Midland County Courthouse
Midland, Texas 79701

the Assistant District Attorney and District Attorney, respectively, representing the Appellee in this cause.

Harris E. Kerr

Harris E. Kerr

APPENDIX

Appendix A: Opinion of the Texas Court of Ciminal Appeals

Appendix B: Denial of Leave to File Motion for Rehearing

Appendix C: Notice of Appeal

Appendix D: Article 42.12, Texas Code of Criminal Procedure, Sections 1 through 8

APPENDIX A

WILLIAM DURWOOD BUSBEE, Appellee

NO. 61,183 Vs. Appeal from MIDLAND County

THE STATE OF TEXAS, Appellee

O P I N I O N

This is an attempted appeal from adjudication of guilt under the provisions of Article 42.12, § 3d, V.A.C.C.P.

On May 25, 1978, the appellant entered a guilty plea to an indictment charging him with possession of more than four ounces of marihuana. The adjudication of guilt was deferred with the appellant's consent, and he was placed on probation for a period of five (5) years subject to certain conditions including "(2) Commit no offense against the laws of this or any other State of the United States or against the laws of the United States."

On June 9, 1978, the State filed a motion to proceed with an adjudication of guilt alleging that on or about June 7, 1978 in Midland County the appellant did then and there knowingly and intentionally possess a usable quantity of marihuana of more than four ounces. A hearing on said motion was conducted on August 10, 11 and 22, 1978, at the conclusion of which the court adjudicated guilt finding that the appellant had violated his probation as alleged. Punishment was fixed at six (6) years' imprisonment.[1/] The court entertained a motion for a new trial and after a hearing overruled the same. On the same date, September 1, 1978, sentence was imposed.

There are several reasons why this appeal must be dismissed. Article 42.12, § 3d, supra, relating to deferred adjudication provides in Subsection (b):

1/ See Walker v. State, 557 S.W.2d 785 (Tex.Cr.App. 1977).

> "On violation of a condition of probation imposed under Subsection (a) of this section, the defendant may be arrested and detained as provided in Section 8 of this Article. The defendant is entitled to a hearing limited to the determination by the court of whether it proceeds with an adjudication of guilt on the original charge. No appeal may be taken from this determination. After an adjudication of guilt, all proceedings, including assessment of punishment, pronouncement of sentence, granting of probation, and defendant's appeal continue as if adjudication of guilt had not been deferred." (Emphasis supplied.)

All of appellant's grounds of error relate to the court's action in determining to adjudicate guilt and the statute makes clear there is no appeal from such determination. Williams v. State, 592 S.W.2d 931 (Tex.Cr.App. 1979); Wright v. State, 592 S.W.2d 604 (Tex.Cr.App. 1980).

Further, we find that the guilty plea was entered as a result of a plea bargain and the court, despite other actions, made it clear since there was a plea bargain there was no right of appeal under Article 44.02, V.A.C.C.P., and it was not granting the right of appeal as it could do under such statute. For this reason, the appeal must also be dismissed.

Further, it does not appear that notice of appeal was given within ten days of the sentence. See Article 44.08(b), V.A.C.C.P. Sentence was imposed on September 1, 1978, and it appears notice of appeal was not given or filed until September 14, 1978.[2/] On September 28, 1978, appellant's court-appointed counsel filed a motion to give effect to previously filed pro se notice of appeal. The court in its order on October 5, 1978 found "good cause" to permit the giving of late notice of appeal under Article 44.08(e), VA.C.C.P., and announced "it will therefore entertain and grant the Defendant leave to file as of September 14, 1978 the Defendant's handwritten and pro se Notice of Appeal and for Setting of Appeal Bond."

2/ We do not find such notice of appeal in the appellate record.

The court's order made clear that nothing in said order or other orders of the court should not be construed as the granting of permission to appeal under Article 44.02, supra. Reference was also made to Article 42.12, § 3d(b), supra, which contains the no appeal provision.

In granting the right to give a belated notice of appeal, the trial court appeared to limit it to the right to file "as of September 14, 1978," which would still make the giving of the notice of appeal untimely. The order, while entered pursuant to the motion filed by appellant's counsel, does not appear to give the appellant any benefit as to the untimeliness of the filing of the notice of appeal.

If, however, the trial court really intended to permit a belated notice of appeal regardless of the date given, there are no affidavits or evidence to support the finding of "good cause." Where late notice of appeal is filed or given, good cause must be shown to the trial court through affidavits or sworn evidence as to why notice of appeal was not timely perfected. Menasco v. State, 503 S.W.2d 273 (Tex.Cr.App. 1973); Abron v. State, 531 S.W.2d 643 (Tex.Cr.App. 1976); McDonald v. State, 501 S.W.2d 111 (Tex.Cr.App. 1973). To enable this court to properly review an appeal from a conviction taken after the expiration of ten days following sentence, allegations as to good cause and evidence thereon must be shown in the record. Morton v. State, 502 S.W.2d 121 (Tex.Cr.App. 1973). This court is not bound by the trial court finding a "good cause." In the instant case there is no evidence or affidavits as to good cause. Thus, there exists still another reason for the dismissal of this appeal.

The appeal is dismissed.

PER CURIAM

(Delivered January 7, 1981)

By: Panel No. 1, Second Quarter, 1979, composed of:

Onion, Presiding Judge
Roberts, Judge
Clinton, Judge

APPENDIX B

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE

Austin, Texas, FEB 18 1981

Dear Sir:

I have been instructed to advise that the Court has this day denied "Leave To File" the Appellant's Motion for Rehearing in Cause No. 61,183, WILLIAM DURWOOD BUSBEE

Motion for Stay of Execution of mandate DENIED

vs.

THE STATE OF TEXAS Appellee.

Sincerely yours,

GLENN HAYNES

THOMAS LOWE, Clerk

APPENDIX C

NO. 61,183

WILLIAM DURWOOD BUSBEE,

Appellant,

VS.

THE STATE OF TEXAS,

APPELLEE.

NOTICE OF APPEAL TO
THE SUPREME COURT OF THE UNITED STATES

HARRIS E. KERR
ID No. 11341500
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Midland, Texas 79702
(Area Code 915) 683-5291

ATTORNEY FOR APPELLANT,
WILLIAM DURWOOD BUSBEE

FILED IN
COURT OF CRIMINAL APPEALS
MAY 12 1981
Thomas Lowe, Clerk

NO. 61,183

WILLIAM DURWOOD BUSBEE,

Appellant,

VS.

THE STATE OF TEXAS,

APPELLEE.

NOTICE OF APPEAL TO
THE SUPREME COURT OF THE UNITED STATES

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Notice is hereby given that William Durwood Busbee, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final Judgment and Order of the Court of Criminal Appeals dismissing Appellant's appeal, entered herein on January 7, 1981. Appellant's motion seeking rehearing of that Order was denied by the Court on February 18, 1981.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

Respectfully submitted,

/s/ Harris E. Kerr

HARRIS E. KERR
ID No. 11341500
P. O. Drawer 511
Midland, Texas 79702
(Area Code 915) 683-5291

CERTIFICATE OF SERVICE

On this the 11 day of May, 1981, a true and correct copy of the foregoing Notice of Appeal to the Supreme Court of the United States was hand delivered to:

David Joers, Esquire
Vern Martin, Esquire
Office of the District Attorney
Midland County Courthouse
Midland, Texas 79701

the Assistant District Attorney and District Attorney, respectively, representing the Appellee in this cause.

Harris E. Kerr

Harris E. Kerr

Art. 42.12. [781d] Adult Probation, Parole, and Mandatory Supervision Law

A. Purpose of Article and Definitions

Section 1. It is the purpose of this Article to place wholly within the State courts of appropriate jurisdiction the responsibility for determining when the imposition of sentence in certain cases shall be suspended, the conditions of probation, and the supervision of probationers, in consonance with the powers assigned to the judicial branch of this government by the Constitution of Texas. It is also the intent of this Article to provide for the release of persons on parole and for the method thereof, to designate the Board of Pardons and Paroles as the responsible agency of State government to recommend determination of paroles and to further designate the Board of Pardons and Paroles as responsible for the investigation and supervision of persons released on parole. It is the intent of this Article to aid all prisoners to readjust to society upon completion of their period of incarceration by providing a program of mandatory supervision for those prisoners not released on parole or through executive clemency and to designate the Board of Pardons and Paroles as the agency of government responsible for the program. It is the final purpose of this Article to remove from existing statutes the limitations, other than questions of constitutionality, that have acted as barriers to effective systems of probations and paroles in the public interest.

Sec. 2. This Article may be cited as the "Adult Probation, Parole, and Mandatory Supervision Law".

Unless the context otherwise requires, the following definitions shall apply to the specified words and phrases as used in this Article:

a. "Courts" shall mean the courts of record having original criminal jurisdiction;

b. "Probation" shall mean the release of a convicted defendant by a court under conditions imposed by the court for a specified period during which the imposition of sentence is suspended;

c. "Parole" shall mean the release of a prisoner from imprisonment but not from the legal custody of the State, for rehabilitation outside of prison walls under such conditions and provisions for disciplinary supervision as the Board of Pardons and Paroles may determine. Parole shall not be construed to mean a commutation of sentence or any other form of executive clemency;

d. "Mandatory supervision" shall mean the release of a prisoner from imprisonment but not on parole and not from the legal custody of the State, for rehabilitation outside of prison walls under such conditions and provisions for disciplinary supervision as the Board of Pardons and Paroles may determine. Mandatory supervision may not be construed as a commutation of sentence or any other form of executive clemency;

e. "Probation officer" shall mean either a person duly appointed by one or more courts of record having original criminal jurisdiction, to supervise defendants placed on probation; or a person designated by such courts for such duties on a part-time basis;

f. "Parole officer" shall mean a person duly appointed by the Director of the Division of Parole Supervision and assigned the duties of investigating and supervising paroled prisoners and prisoners released to mandatory supervision to see that the conditions of parole or mandatory supervision are complied with;

g. "Board" shall mean the Board of Pardons and Paroles;

h. "Division" shall mean the Division of Parole Supervision of the Board of Pardons and Paroles; and

i. "Director" shall mean the Director of the Division of Parole Supervision.

B. Probations

Sec. 3. The judges of the courts of the State of Texas having original jurisdiction of criminal actions, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public as well as the defendant will be subserved thereby, shall have the power, after conviction or a plea of guilty for any crime or offense, where the maximum punishment assessed against the defendant does not exceed ten years imprisonment, to suspend the imposition of the sentence and may place the defendant on probation or impose a fine applicable to the offense committed and also place the defendant on probation as hereinafter provided. In all cases where the punishment is assessed by the Court it may fix the period of probation without regard to the term of punishment assessed, but in no event may the period of probation be greater than 10 years or less than the minimum prescribed for the offense for which the defendant was convicted. Any such person placed on probation, whether in a trial by jury or before the court, shall be under the supervision of such court.

Sec. 3a. Where there is a conviction in any court of this State and the punishment assessed by the jury shall not exceed ten years, the jury may recommend probation for a period of any term of years authorized for the offense for which the defendant was convicted, but in no event for more than ten years, upon written sworn motion made therefor by the defendant, filed before the trial begins. When the jury recommends probation, it may also assess a fine applicable to the offense for which the defendant was convicted. When the trial is to a jury, and the defendant has no counsel, the court shall inform the defendant of his right to make such motion, and the court shall appoint counsel to prepare and present same, if desired by the defendant. In no case shall probation be recommended by the jury except when the sworn motion and proof shall show, and the jury shall find in their verdict that the defendant has never before been convicted of a felony in this or any other State. This law is not to be construed as preventing the jury from passing on the guilt of the defendant, but he may enter a plea of not guilty. In all eligible cases, probation shall be granted by the court, if the jury recommends it in their verdict, for the period recommended by the jury.

If probation is granted by the jury the court may impose only those conditions which are set forth in Section 6 hereof.

Sec. 3b. Where probation is recommended by the verdict of a jury as provided for in Sec. 3a above, a defendant's probation shall not be revoked during his good behavior, so long as he is within the jurisdiction of the court and his residence is known, except in accordance with the provisions of Sec. 8 of this Article. If such a defendant has no counsel, it shall be the duty of the court to inform him of his right to show cause why his probation should not be revoked; and if such a defendant requests such right, the court shall appoint counsel in accordance with Articles 26.01 and 26.05 of this Code to prepare and present the same; and in all other respects the procedure set forth in said Sec. 8 of this Article shall be followed.

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Sec. 3c. Nothing herein shall limit the power of the court to grant a probation of sentence regardless of the recommendation of the jury or prior conviction of the defendant.

Sec. 3d. (a) When in its opinion the best interest of society and the defendant will be served, the court may, after receiving a plea of guilty or plea of nolo contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt, and place the defendant on probation on reasonable terms and conditions as the court may require and for a period as the court may prescribe not to exceed 10 years. However, upon written motion of the defendant requesting final adjudication filed within 30 days after entering such plea and the deferment of adjudication, the court shall proceed to final adjudication as in all other cases.

(b) On violation of a condition of probation imposed under Subsection (a) of this section, the defendant may be arrested and detained as provided in Section 8 of this Article. The defendant is entitled to a hearing limited to the determination by the court of whether it proceeds with an adjudication of guilt on the original charge. No appeal may be taken from this determination. After an adjudication of guilt, all proceedings, including assessment of punishment, pronouncement of sentence, granting of probation, and defendant's appeal continue as if the adjudication of guilt had not been deferred.

(c) On expiration of a probationary period imposed under Subsection (a) of this section, if the court has not proceeded to adjudication of guilt, the court shall dismiss the proceedings against the defendant and discharge him. The court may dismiss the proceedings and discharge the defendant prior to the expiration of the term of probation if in its opinion the best interest of society and the defendant will be served. A dismissal and discharge under this section may not be deemed a conviction for the purposes of disqualifications or disabilities imposed by law for conviction of an offense, except that upon conviction of a subsequent offense, the fact that the defendant had previously received probation shall be admissible before the court or jury to be considered on the issue of penalty.

Sec. 3e. (a) For the purposes of this section, the jurisdiction of the courts in this state in which a sentence requiring confinement in the Texas Department of Corrections is imposed for conviction of a felony shall continue for 120 days from the date the execution of the sentence actually begins. After the expiration of 60 days but prior to the expiration of 120 days from the date the execution of the sentence actually begins, the judge of the court that imposed such sentence may, on his own motion or on written motion of the defendant, suspend further execution of the sentence imposed and place the defendant on probation under the terms and conditions of this article, if such sentence is otherwise eligible for probation under this article and prior to the execution of such sentence, the defendant had never been incarcerated in a penitentiary serving a sentence for a felony and in the opinion of the judge the defendant would not benefit from further incarceration in a penitentiary. Probation may be granted under this section only if the offense for which the defendant was sentenced was an offense other than criminal homicide, rape, or robbery.

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(b) When the defendant files a written motion requesting suspension by the court of further execution of the sentence and placement on probation, or when requested to do so by the judge, the clerk of the court shall request a copy of the defendant's record while incarcerated from the Texas Department of Corrections. Upon receipt of such request, the Texas Department of Corrections shall forward to the court, as soon as possible, a full and complete copy of the defendant's record while incarcerated.

Sec. 3f. (a) The provisions of Sections 3 and 3c of this Article do not apply:

(1) to a defendant adjudged guilty of an offense defined by the following sections of the Penal Code:

(A) Section 19.03 (Capital murder);

(B) Section 20.04 (Aggravated kidnapping);

(C) Section 21.03 (Aggravated rape);

(D) Section 21.05 (Aggravated sexual abuse);

(E) Section 29.03 (Aggravated robbery); or

(2) to a defendant when it is shown that the defendant used or exhibited a deadly weapon as defined in Section 1.07(a)(11), Penal Code, during the commission of a felony offense or during immediate flight therefrom. Upon affirmative finding that the defendant used or exhibited a deadly weapon during the commission of an offense or during immediate flight therefrom, the trial court shall enter the finding in the judgment of the court. Upon an affirmative finding that the deadly weapon the defendant used or exhibited was a firearm, the court shall enter that finding in its judgment.

(b) If there is an affirmative finding that the defendant convicted of a felony of the second degree or higher used or exhibited a firearm during the commission or flight from commission of the offense and the defendant is granted probation, the court may order the defendant confined in the Texas Department of Corrections for not less than 60 and not more than 120 days. At any time after the defendant has served 60 days in the custody of the Department of Corrections, the sentencing judge, on his own motion or on motion of the defendant, may order the defendant released to probation. The Department of Corrections shall release the defendant to probation after he has served 120 days.

Sec. 4. When directed by the court, a probation officer shall fully investigate and report to the court in writing the circumstances of the offense, criminal record, social history and present condition of the defendant. Whenever practicable, such investigation shall include a physical and mental examination of the defendant. Defendant, if not represented by counsel, counsel for defendant and counsel for the state shall be afforded an opportunity to see a copy of the report upon request. If a defendant is committed to any institution the probation officer shall send a report of such investigation to the institution at the time of commitment.

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Sec. 5. Only the court in which the defendant was tried may grant probation, fix or alter conditions, revoke the probation, or discharge the defendant, unless the court has transferred jurisdiction of the case to another court with the latter's consent. After a defendant has been placed on probation, jurisdiction of the case may be transferred to a court of the same rank in this State having geographical jurisdiction where the defendant is residing or where a violation of the conditions of probation occurs. Upon transfer, the clerk of the court of original jurisdiction shall forward a transcript of such portions of the record as the transferring judge shall direct to the court accepting jurisdiction, which latter court shall thereafter proceed as if the trial and conviction had occurred in that court. Any court having geographical jurisdiction where the defendant is residing or where a violation of the conditions of probation occurs may issue a warrant for his arrest, but the determination of action to be taken after arrest shall be only by the court having jurisdiction of the case at the time the action is taken.

Sec. 6. The court having jurisdiction of the case shall determine the terms and conditions of probation and may, at any time, during the period of probation alter or modify the conditions; provided, however, that the clerk of the court shall furnish a copy of such terms and conditions to the probationer, and shall note the date of delivery of such copy on the docket. Terms and conditions of probation may include, but shall not be limited to, the conditions that the probationer shall:

a. Commit no offense against the laws of this State or of any other State or of the United States;

b. Avoid injurious or vicious habits;

c. Avoid persons or places of disreputable or harmful character;

d. Report to the probation officer as directed by the judge or probation officer and obey all rules and regulations of the probation department;

e. Permit the probation officer to visit him at his home or elsewhere;

f. Work faithfully at suitable employment as far as possible;

g. Remain within a specified place;

h. Pay his fine, if one be assessed, and all court costs whether a fine be assessed or not, in one or several sums, and make restitution or reparation in any sum that the court shall determine;

i. Support his dependents;

j. Participate in any community-based program;

k. Reimburse the county in which the prosecution was instituted for compensation paid to appointed counsel for defending him in the case if counsel was appointed, or if he was represented by a county-paid public defender, in an amount that would have been paid to an appointed attorney had the county not had a public defender;

l. Remain under custodial supervision in a community-based facility, obey all rules and regulations of such facility, and pay a percentage of his income to the facility for room and board;

m. Pay a percentage of his income to his dependents for their support while under custodial suspension in a community-based facility; and

n. Pay a percentage of his income to the victim of the offense, if any, to compensate the victim for any property damage or medical expenses sustained by the victim as a direct result of the commission of the offense.

Sec. 6a. (a) A court granting probation may fix a fee not exceeding $15 per month to be paid to the court by the probationer during the probationary period. The court may make payment of the fee a condition of granting or continuing the probation.

(b) The court shall deposit the fees received under Subsection (a) of this section in the special fund of the county treasury provided by Section 4.05(b), Article 42.121 of this Code, to be used for the same purposes for which state-aid may be used under that section.

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Sec. 6b. (a) When the court having jurisdiction of the case grants probation to the defendant, in addition to the conditions imposed under Section 6 of this article, the court may require as a condition of probation that the defendant submit to a period of detention in a penal institution to serve a term of imprisonment not to exceed 30 days or one-third of the sentence whichever is lesser.

(b) The imprisonment imposed shall be treated as a condition of probation, and in the event of a sentence of imprisonment upon the revocation of probation, the term of imprisonment served hereunder shall be credited toward service of such subsequent imprisonment.

Sec. 7. At any time, after the defendant has satisfactorily completed one-third of the original probationary period or two years of probation, whichever is the lesser, the period of probation may be reduced or terminated by the court. Upon the satisfactory fulfillment of the conditions of probation, and the expiration of the period of probation, the court, by order duly entered, shall amend or modify the original sentence imposed, if necessary, to conform to the probation period and shall discharge the defendant. In case the defendant has been convicted or has entered a plea of guilty or a plea of nolo contendere, and the court has discharged the defendant hereunder, such court may set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty, except that proof of his said conviction or plea of guilty shall be made known to the court should the defendant again be convicted of any criminal offense.

Sec. 8. (a) At any time during the period of probation the court may issue a warrant for violation of any of the conditions of the probation and cause the defendant to be arrested. Any probation officer, police officer or other officer with power of arrest may arrest such defendant without a warrant upon the order of the judge of such court to be noted on the docket of the court. A probationer so arrested may be detained in the county jail or other appropriate place of detention until he can be taken before the court. Such officer shall forthwith report such arrest and detention to such court. If the defendant has not been released on bail, on motion by the defendant the court shall cause the defendant to be brought before it for a hearing within 20 days of filing of said motion, and after a hearing without a jury, may either continue, modify, or revoke the probation. The state may amend the motion to revoke probation any time up to seven days before the date of the revocation hearing, after which time the motion may not be amended except for good cause shown, and in no event may the state amend the motion after the commencement of taking evidence at the hearing. The court may continue the hearing for good cause shown by either the defendant or the state. If probation is revoked, the court may proceed to dispose of the case as if there had been no probation, or if it determines that the best interests of society and the probationer would be served by a shorter term of imprisonment, reduce the term of imprisonment originally assessed to any term of imprisonment not less than the minimum prescribed for the offense of which the probationer was convicted.

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(b) Any probationer who removes himself from the State of Texas without permission of the court having jurisdiction of the case, shall be deemed and considered a fugitive from justice and shall be subject to extradition as now provided by law. No part of the time that the defendant is on probation shall be considered as any part of the time that he shall be sentenced to serve. The right of the probationer to appeal to the Court of Criminal Appeals for a review of the trial and conviction, as provided by law, shall be accorded the probationer at the time he is placed on probation. When he is notified that his probation is revoked for violation of the conditions of probation and he is called on to serve a sentence in a jail or in an institution operated by the Department of Corrections, he may appeal the revocation.

Text of subsec. (c) added by Acts 1977, 65th Leg., p. 909, ch. 342, § 2.

(c) In a probation revocation hearing at which it is alleged only that the probationer violated the conditions of probation by failing to pay probation fees, court costs, restitution, or reparations, the inability of the probationer to pay as ordered by the court is an affirmative defense to revocation, which the probationer must prove by a preponderance of evidence.

Text of subsec. (c) added by Acts 1977, 65th Leg., p. 1058, ch. 383, § 2.

(c) In a probation revocation hearing at which it is alleged that the probationer violated the conditions of probation by failing to pay compensation paid to appointed counsel, probation fees, court costs, restitution, or reparations, the inability of the probationer to pay as ordered by the court is an affirmative defense to revocation, which the probationer must prove by a preponderance of evidence.

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NO. 80-6692

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

WILLIAM DURWOOD BUSBEE,

Appellant,

V.

THE STATE OF TEXAS,

Appellee

On Appeal From The
Texas Court Of Criminal Appeals

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

I. WHETHER APPELLANT'S NOTICE OF APPEAL FROM THE TEXAS COURT OF CRIMINAL APPEALS WAS TIMELY AND PROPERLY FILED?

II. WHETHER THE BASIS FOR DECISION BY APPELLEE CONSTITUTE INDEPENDENT AND ADEQUATE STATE GROUNDS?

III. WHETHER APPELLANT PRESENTS A SUBSTANTIAL FEDERAL QUESTION FOR REVIEW?

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NO. 80-6692

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

WILLIAM DURWOOD BUSBEE,

Appellant,

V.

THE STATE OF TEXAS,

Appellee

On Appeal From The
Texas Court Of Criminal Appeals

MOTION TO DISMISS OR AFFIRM

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Appellee moves the Court to dismiss the appeal herein because (1) Appellant's petition for writ of certiorari was not timely and properly filed, (2) Appellant's petition does not manifest a substantial federal question, and (3) the lower court decision was based on adequate and independent state grounds; or, in the alternative, to affirm the judgment of the Texas Court of Criminal Appeals.

JURISDICTION

Appellant seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257 (2).

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

Appellant in the petition challenges the validity of Article 42.12 §3(d), V.A.C.C.P. That statute provides for deferred adjudication procedures and provides certain procedures for its implementation and termination.

Section 3(d) of Article 42.12 provides that a court may grant deferred adjudication for a person accused of committing a crime upon a plea of guilty or nolo contendere. The court hears evidence and finds that it substantiates the defendant's guilt, whereupon it defers further proceedings without entering an adjudication of guilt. Deferred adjudication may not exceed ten (10) years.

Appellant received such an adjudication with the stipulation that he commit no further violation of the law. The Appellant's deferred adjudication was revoked pursuant to a charge of possession of marijuana. He was then sentenced to a term of six years in the Texas Department of Corrections after an adjudication of his guilty in conformity with Article 42.12 §(3)d, V.A.C.C.P.

Appellant challenges the part of Section 3(d) that prohibits an appeal from a determination to adjudicate guilt when deferred adjudication was received pursuant to the statute.

THE PROCEEDINGS BELOW

The Appellant pled guilty to the felony offense of possession of more than four (4) ounces of marijuana at a hearing held before the trial court on May 25, 1978 (Tr. 1, 8). Pursuant to Section 3(d) of Article 42.12, Texas Code of Criminal Procedure, the trial court entered its order deferring adjudication of guilt and further proceedings, and placed him on probation for a term of five (5) years. One of the conditions of that probation was that he commit no further violation of law.

On June 9, 1978, the State filed a motion to revoke Appellant's probation and proceed with a determination to adjudicate guilt. Appellant was arrested, and a hearing on the State's motions commenced August 10, 1978, before the court.

The State's motion to revoke Appellant's deferred adjudication probation alleged that he had violated the terms of his probation by committing an offense, in violation of state law, by possessing marijuana.

The trial court ordered that Appellant's deferred adjudication be revoked, and proceeded to adjudicate Appellant's guilt sentencing him to a term of six (6) years in the Texas Department of Corrections. Appellant's motion for new trial was denied.

Appellant filed a notice of appeal that was not timely. However, the trial court found that good cause existed and allowed the appeal to be filed.

Appellant appealed to the Texas Court of Criminal Appeals on a number of grounds. The Court of Criminal Appeals dismissed Appellant's appeal by per curiam order delivered January 7, 1981. The court's decision was based on the fact that Article 42.12 §3(d), V.A.C.C.P. did not allow appeals from an adjudication of guilt, Appellant had failed to file a timely appeal and that the extension granted was not substantiated by the trial court record.

Appellant filed a motion for rehearing en banc. The Court of Criminal Appeals denied Appellant's motion for rehearing en banc on February 18, 1981. The Court of Criminal Appeals did not stay the issuance of its mandate, and Appellant is now in the custody of the Texas Department of Corrections. This appeal resulted.

I.

MOTION TO DISMISS

The State of Texas, Appellee herein, moves to dismiss this appeal on the grounds that (1) the federal question sought to be reviewed was not timely or properly raised; (2) the judgment rests on an adequate non-federal basis; and (3) the Appellant does not present a substantial federal question.

A. THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NOT TIMELY OR PROPERLY FILED.

The Appellant improperly seeks to invoke the jurisdiction of the Court pursuant to 28 U.S.C. §1257 (2). Section 1257 (2) allows Appellant ninety days to appeal from the date of final decision by a state court in which to file a writ of certiorari.

The time for appeal or certiorari from a state court judgment in a criminal case is prescribed by rule of the Supreme Court, 28 U.S.C. 2102 (d). Proceeding for review should be instituted within the prescribed time, United States v. Hancock Truck Lines, Inc., 324 U.S. 774 and, if there is a failure to do so, the Court may dismiss the petition. Bomer v. Tennessee, 318 U.S. 771 and Samras v. United States, 317 U.S. 634 (1942).

In fact, this appeal from a criminal conviction is governed by Rule 20 (1), which prescribes a sixty day time period in which to file a petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort. An extension for good cause not to exceed 30 days may be granted by a Justice of the Court.

This is an appeal from the Texas Court of Criminal Appeals, the court of last resort in criminal cases in the State of Texas. The last judgment rendered by the Court of Criminal Appeals was the denial of a motion for rehearing en banc on February 18, 1981. Appellant filed notice of appeal with the Clerk of the Texas Court of Criminal Appeals on May 12, 1981. Eighty-three days elapsed from February 18, 1981 to May 12, 1981. No motion for extension of time was ever submitted. Thus, the Appellant's appeal is not timely and jurisdiction is not proper. Appellee moves this Court to dismiss Appellant's petition accordingly.

B. THE JUDGMENT OF THE STATE COURT RESTS ON AN ADEQUATE NON FEDERAL BASIS.

It is well established that a state decision is not reviewable by the Supreme Court, and the appeal may be dismissed where the record shows that although there may be a federal question in the case, there is also an independent question not federal in

character, decided by the state court, which in itself is broad enough to sustain the judgment. National Broadcasting Co., Inc. v. Niemi, 434 U.S. 1354 (1978) Dismissal is also proper if it appears that the decision of a federal question was not necessary to the determination of the cause or was not actually decided, Murdock v. City of Memphis, 20 Wall. 590, 636 (1874); Fox Film Corp. v. Muller, 296 U.S. 207 (1935).

The decision of the State of Texas was based on independent and adequate state grounds. The Texas Court of Criminal Appeals based its opinion on two grounds:

> (1) that Article 42.12 §3(d) V.A.C.C.P. did not allow the review requested by Appellant and
>
> (2) if it did, Appellant's notice of appeal was not timely.

First the Court found that Article 42.12 §3(d) did not allow an appeal to be taken from the decision to adjudicate guilt when one was being sentenced under the original deferred charge.

The court also held that Appellant had not complied with Article 44.08 (c), V.A.A.C.P., [1/] which requires that an appeal be made within ten days. Even though the trial court found good cause to permit the filing of late notice of appeal under Article 44.08 (e) V.A.C.C.P., such permission did not comply with

---

1/ Art. 44.08 Notice of appeal.
(a) It shall be necessary for defendant, as a condition of perfecting an appeal to the Court of Criminal Appeals, to give notice of appeal. This notice may be given orally in open court or may be in writing filed with the clerk. Such notice shall be sufficient if it shows the desire of defendant to appeal from the conviction to the Court of Criminal Appeals.
(b) In cases where the death penalty has been assessed or in probation cases where imposition of sentence is suspended, such notice shall be given or filed within ten days after overruling of the motion or amended motion for new trial and if there be no motion or amended motion for new trial, then within ten days after entry of judgment on the verdict.
(c) In all other cases such notice shall be given or filed within ten days after sentence is pronounced.
(d) The record on appeal will be deemed sufficient to show notice of appeal was duly given if it contains written notice of appeal showing a date of filing within the time required by law of if the record...

statutory requirements. Under state law, when late notice of appeal is filed or given, good cause must be shown to the trial court through affidavits or sworn evidence as to why notice of appeal was not timely perfected. 2/

The requirement that Appellant comply with State appellate procedure is solely a non federal ground. The finding that Appellant did not comply with the time allowed for appeal nor the process for securing an extension of time to file said appeal for good cause is an adequate state basis for the decision of the Texas Court of Criminal Appeals.

II.

MOTION TO AFFIRM

C. APPELLANT'S APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

It is established that the presence of a material federal question in the case is essential as a jurisdictional basis for review of a state decision by the Supreme Court. New York, Chicago & St. Louis Railroad Co. v. Frank, 314 U.S. 360 (1971); Hunter Company, Inc. v. McHugh Commissioner of Conservation, et al., 320 U.S. 222 (1943). The alleged controversy must be one calling for serious attention. It must not be so absolutely devoid of merit as to be frivolous. Nor can it be so explicitly foreclosed by prior decisions of the Supreme Court as to leave no room for real controversy.

Appellant voluntarily elected the benefits of Article 42.12, § 3(d), V.A.C.C.P. By so doing Appellant avoided blemishing his record by an adjudication of guilt. Once the benefit of the statute was accepted, the possibility of a future adjudication of guilt became intertwined with that selection. The Appellant now seeks to appeal from the court's decision to proceed to a deter-

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2/ See, Morasco v. State, 503 S.W.2d 273 (Tex.Cr.App. 1973). Abron v. State, 531 S.W.2d 643 (Tex.Cr.App. 1976). McDonald v. State, 501 S.W.2d 11 (Tex.Cr.App. 1973) when an appeal after ten days is made the record must reflect an affidavit or sworn testimony to justify a finding of good cause. If the record fails to reflect such evidence the reviewing court may dismiss the appeal.

mination to adjudicate guilt, he does not challenge the actual adjudication and finding of guilt on the original charge.

It must be pointed out that Appellant has the right to appeal from his adjudication of guilt as would any person subject to the various types of probation enumerated in Article 42.12, V.A.C.C.P. The individual selects the deferred adjudication route. When he does so, he elects the entire statute not just the most favorable section.

Appellant has clearly failed to allege any substantial federal question. Any due process rights he has are protected by the statute's allowance of an appeal from a final adjudication of guilt. Appellant's negligence in filing a timely and proper appeal does not launch this dispute to the level of a substantial federal question.

III.

CONCLUSION

WHEREFORE, Appellee respectfully submits that this appeal by Appellant is not timely and properly filed; and that the decision below rests on adequate state grounds. The Appellee respectfully moves the Court to dismiss this petition, or, in the alternative, to affirm the judgment entered in the cause by the Texas Court of Criminal Appeals on the basis that no substantial federal question has been presented by Appellant.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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WILLIAM DURWOOD BUSBEE,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

ON APPEAL FROM
THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS OR AFFIRM

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NO. 80-6692

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

ON APPEAL FROM
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OF THE STATE OF TEXAS

BRIEF OPPOSING APPELLEE'S
MOTION TO DISMISS OR AFFIRM

BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS OR AFFIRM

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Appellant William Durwood Busbee hereby files this Brief Opposing Appellee's Motion to Dismiss or Affirm, and

would show the Court that Appellee has failed to raise any proper ground on which such a dismissal or affirmance can or should be based.

1.

This Is A Direct Appeal, Not A Petition for Writ of Certiorari

Appellee's first ground for dismissal is that Appellant's appeal is not timely. In reaching this conclusion, Appellee has misconstrued the nature of this proceeding and also the statutes involved.

This case is a direct appeal brought by Appellant from a decision of the Texas Court of Criminal Appeals upholding the validity of a Texas statute, Article 42.12, Section 3 (d), of the Texas Code of Criminal Procedure. This Texas Court of Criminal Appeals is the highest Court of the State of Texas, insofar as criminal cases are concerned. Appellant brings this appeal pursuant to 28 U. S. C., Section 1257 (2), authorizing such a direct appeal.

Appellee would apparently have this Court construe this cause not as a direct appeal, but as a Petition for Writ of Certiorari pursuant to 28 U. S. C., Section 1257 (3). In fact, Appellant's circumstances would allow him to either file a direct appeal, or a Petition for Writ of Certiorari, as by this cause he is seeking review of decision by Texas' highest criminal court upholding the validity of a state statute claimed to be invalid as being repugnant to the Constitution of the United States. See Cyclopedia of Federal Procedure, Section 57.140 and Section 60.138.

Appellant made clear in his jurisdictional statement that he was pursuing a direct appeal to this Court, and

not seeking certiorari. Appellee has admitted, in its Motion, that notice of appeal was given within the 90 day period provided in Rule 11.1 of this Court. Appellant submits that for these reasons, Appellee's Motion to Dismiss for Lack of Jurisdiction should be denied.

2.

There Was No Adequate Non-Federal Ground for The Decision of the State Court

Appellee requests this Court to dismiss this appeal, or affirm the Judgment of the Texas Court of Criminal Appeals, because the Judgment has an adequate state ground. We submit that this is at best circular and peculiar logic.

The Court below plainly and clearly held that Appellant's appeal must be dismissed because the state "statute makes clear there is no appeal from such determination." (Opinion of the Court of Criminal Appeals, Page 2) The Court went on to state that no notice of appeal was timely filed by Appellant, and for that reason, the appeal should be dismissed. Appellant believes, first, that the record in this case belies the logic of the Court below in stating notice of appeal was not timely filed, and, more importantly, that it is as an independent state ground for the decision, when Appellant attacks the state statute as being unconstitutional, based on its express wording.

Appellant believes that the record will show that he was sentenced on September 1, 1978, and himself filed a pro se and handwritten notice of appeal, dated September 13, 1978, with the Court. That notice was apparently filed on September 14, 1978. Appellant's present attorney was appointed by the Trial Court to pursue whatever appellate

rights he might have, by Order dated September 13, 1978, filed September 14, 1978. Appellant's attorney learned of his appointment some time following September 14, 1978. Appellant's attorney never had a chance to consult with Appellant prior to a hearing, as Appellant was transported from the Midland County Jail to the Texas Department of Corrections on September 14, 1978.

Without then having consulted with Appellant, his attorney filed a Motion with the Trial Court, asking that Appellant be returned to Midland County and that a hearing be held to determine whether or not the Trial Court should give effect to the late filed pro se notice of appeal and permit Appellant to appeal the Trial Court's proceeding to adjudicate his guilt.

By Order dated October 4, 1978, the Trial Court set that Motion for hearing on October 20, 1978, at 2:00 o'clock P. M., and directed that Appellant be returned to the Midland County Jail so that he could attend that hearing. On October 5, 1978, prior to Appellant's return to Midland County, and prior to the holding of any hearing whatsoever, the Trial Court, on its own motion, decided that good cause for permitting the requested late giving of notice of appeal had been shown, and the Trial Court did then "grant Defendant leave to file as of September 14, 1978, the Defendant's handwritten and pro se 'notice of appeal and for setting of appeal bond.'"

Appellant believes that it is only by the most tortured reasoning that the Texas Court of Criminal Appeals refused to treat this Order as precisely what it says it is, an Order granting an out-of-time appeal. Beyond that, Appellant fails to understand how the Texas Court of Criminal Appeals found that to be material to its decision.

Appellant's primary contention in the Texas Court of Criminal Appeals and in this Court is that the statute he has been sentenced under violates the Constitution of the United States because it expressly denies him a right to appeal a decision to proceed to adjudicate his guilt, while others similarly situated are expressly afforded such an appeal. The Texas Court plainly and clearly held that the statute expressly provided that no appeal could be taken. To then go forward and say "But if" the statute had provided an appeal, notice was not properly given - or the Court thinks you will lose on merits - or the case has no merit - does not in any way detract from Appellant's main point, that the statute is unconstitutional.

Appellant submits that the Judgment below says "the statute provides for no appeal, but even if it did, your appeal should be dismissed." Appellee would have the Court fix on the "even if it did" language, and dismiss this appeal. The "even if it did" language neither adds to nor subtracts from the Court's plain Judgment, that the statute provides for no appeal, which is precisely Appellant's complaint in that Court and this Court. The fact that <u>if</u> the statute had provided for an appeal, Appellant may have failed to follow certain steps, does not change one whit the fact that denial of the appeal by express statutory wording, and express judicial holdings, denies Appellant the equal protection of the law to which he is entitled. Appellant's Motion should not be granted on this ground.

3.

<u>Appellant Most Certainly Presents A Substantial Federal Question</u>

Appellee states on Page 7 of the Motion, "it must be pointed out that Appellant has the right to appeal from

his adjudication of guilt as would any person subject to the various types of probation enumerated in Article 42.12, V. A. C. C. P." What Appellee is alluding to is that after the Trial Court has revoked probation and adjudicated guilt, an appeal from the original plea of guilty may be taken, if the Trial Court gives permission. This is most clearly not an appeal from the decision to revoke probation and adjudicate guilt. The statute offers Appellant no protections whatsoever against abuse of discretion in the revoking of his probation and adjudication of his guilt, while others, similarly situated, are afforded those protections.

By statute, Texas grants all probationers, other than those whose adjudication of guilt has been deferred, the absolute right to appeal a revocation of their probation. Just as expressly, by statute, Texas denies Appellant, and others, the right to appeal the Trial Court's determination to proceed to adjudicate guilt and revoke his probation. Not only does Appellant have the same protected liberty interests as other probationers, he has an additional interest: the right to maintain a clear record, free of an adjudication of guilt. These are significant interests, significant to Appellant, and, we submit, to the administration of justice. We submit that these are substantial federal questions.

CONCLUSION

Appellant submits that Appellee has shown no grounds whatsoever to dismiss this appeal or affirm the Judgment below. This appeal is properly before this Court, rests on no independent state grounds having any bearing on the constitutional validity of the statute involved, and

presents substantial federal questions. Appellant respectfully asks that this Court declare the statute unconstitutional and remand this case to the Trial Court for proceedings under the original indictment, as if none of the intervening proceedings, including Appellant's plea of guilt, had taken place.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on the 10 day of November, 1981, a copy of the foregoing Brief Opposing Appellee's Motion to Dismiss or Affirm was mailed, postage prepaid, to each of the following, the attorneys representing Appellee:

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